

**IN THE HIGH COURT OF NEW ZEALAND  
GISBORNE REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TŪRANGANUI-A-KIWA ROHE**

**CIV-2016-416-12  
CIV-2016-416-46  
[2019] NZHC 2888**

IN THE MATTER	Of an application pursuant to sections 22, 24 and 25 of the Criminal Proceeds (Recovery) Act 2009
BETWEEN	THE COMMISSIONER OF POLICE Applicant
AND	THOMAS CHENG First Respondent
AND	MASONIC LIMITED Second Respondent
AND	REDOUBT HOUSE LIMITED Third Respondent
AND	ACTION INVESTMENTS LIMITED Fourth Respondent
AND	ACTION INVESTMENT LLP Fifth Respondent
AND	HARVEST PROPERTY LLP Sixth Respondent
AND	MORTGAGE INTERNATIONAL LLP Seventh Respondent
AND	EXPRESS FACTOR LLP Eighth Respondent
AND	WILLIAM CHENG First Interested Party
AND	NYIOH CHEW HONG Second Interested Party

Hearing: 25 September 2019 and 4 October 2019

Appearances: F Cleary for Applicant  
S Campbell for First Respondent  
A Simperingham for First and Second Interested Party

Judgment: 6 November 2019

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### JUDGMENT OF GRICE J

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[1] Mr Thomas Cheng, the first respondent, has been convicted of serious methamphetamine offending. There are also allegations that he, his father, Mr William Cheng, and his step mother, Ms Nyioh, have been involved in tax evasion.<sup>1</sup>

[2] On 4 April 2016 Wylie J made without notice restraining orders over to six commercial properties in Gisborne (the Gisborne properties) and three bank accounts connected to Mr Thomas Cheng (Order One).<sup>2</sup>

[3] An on-notice application to maintain the restraint of those properties and bank accounts was then made. Mr William Cheng and Ms Nyioh opposed that application as interested parties. On 28 September 2016 Simon France J upheld the application to maintain the restraining order following a defended hearing.<sup>3</sup> The Commissioner of Police (the Commissioner) then applied for the extensions of the order in 2017 and 2018. Both extensions were granted.

[4] On 15 December 2016 the Commissioner applied for a second without notice order to restrain nine other properties and nine bank accounts. The Commissioner made an on-notice application on 13 March 2017 which was granted by Williams J on 1 May 2017 (Order Two).<sup>4</sup>

[5] On 30 April 2019 the Commissioner made the application which is presently before the Court to extend both Orders One and Two then due to expire in May 2019.<sup>5</sup>

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<sup>1</sup> While the Commissioner of Police is the applicant in these proceedings, it is the Commissioner of Inland Revenue (the IRD) who has been carrying out the relevant tax investigation. Information from that investigation forms the basis for the allegation of tax offending.

<sup>2</sup> *Commissioner of Police v Cheng* HC Gisborne CIV-2016-416-12, 4 April 2016.

<sup>3</sup> *Commissioner of Police v Cheng* [2016] NZHC 2304.

<sup>4</sup> *Commissioner of Police v Cheng* HC Gisborne CIV-2016-416-46, 1 May 2017 (Minute).

<sup>5</sup> The Orders have been extended by consent pending this decision.

Mr William Cheng and Ms Nyioh, on the one hand, and Mr Thomas Cheng, on the other, have filed notices of opposition. They argue the property involved is not tainted, they have not unlawfully benefitted from significant criminal activity and the length of time Orders One and Two have been in place is causing prejudice to them. They say it is not in the interests of justice to extend the Orders.

### **The property**

[6] Order One relates to six Gisborne properties, two bank accounts in Mr Thomas Cheng's name with balances of \$531.55 and \$30,132.34 and one bank account in Mr William Cheng's name with a current balance of \$60,589.85.

[7] Order Two relates to nine properties and the funds in eight bank accounts in Mr William Cheng's name<sup>6</sup> and one bank account in the name of Worldwide Models Ltd.<sup>7</sup>

[8] Several of the bank accounts listed continue to be operated. Any money that has been deposited in those account since the relevant restraining order has not been the subject of restraint.

[9] Mr Thomas Cheng had been managing one of the Gisborne properties and had inferred to or told an undercover policeman that he owned them. The six commercial properties which were restrained in Order One were owned by five corporate entities with which Mr William Cheng or Ms Nyioh are associated. Mr William Cheng and Ms Nyioh are based in Singapore. Mr Thomas Cheng has also been associated with the Singaporean companies which own one of the Order One properties. He has also been associated with a limited liability partnership which was mortgagee of two of the other Order One properties.

[10] The web of ownership for both the Order One and Order Two properties is complex. The Order One properties are subject to mortgages. The mortgagees are two Singaporean registered companies with which either Mr William Cheng or

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<sup>6</sup> These bank accounts had the following balances: \$1,599,734.65; \$1,161,887.20; \$1,588,075.73; \$1,166,137.83; \$3,065,203.98; \$342,449.05; \$397.68; and \$1,453,423.91.

<sup>7</sup> The balance of that bank account was \$667.79.

Ms Nyioh were or are associated. The Order Two properties are owned by companies which are or have been associated with Mr William Cheng and Ms Nyioh.

[11] Ms Cleary, for the Crown, produced a diagram of the ownership of the New Zealand property that is the subject of the restraining orders. This illustrates the relationships between the companies and limited liability partnerships presently owning or having interests as mortgagees in the properties. The owners of the properties are all named as respondents in the present proceedings. Importantly the diagram shows the relationship between Mr William Cheng, Ms Nyioh and Mr Thomas Cheng and their association with those properties through various entities in a complex web of relationships.

[12] Ms Nyioh and Mr Thomas Cheng also hold a power of attorney over Mr William Cheng's affairs. Mr William Cheng is in his 60s but suffers from ill-health and there was some suggestion he had some memory problems. Mr Simperingham indicated that the health problems were not such as to raise any concerns about his ability to participate in these proceedings.

### **The parties**

[13] Mr Thomas Cheng has been convicted of serious methamphetamine offending during the period from December 2015 to April 2016. Order One was made when he was arrested. He was sentenced for this offending on the 22 February 2018.

[14] Mr Thomas Cheng faces further charges in relation to methamphetamine dealing arising from an investigation code named "Operation Dory" which terminated on 9 May 2019. This offending is alleged to have occurred while Mr Thomas Cheng was in prison for the first set of methamphetamine offending.

[15] The Commissioner says that the criminal activity underpinning the restraining orders in Order One as they relate to the bank accounts in Mr Thomas Cheng's name include methamphetamine dealing and/or money laundering. In relation to accounts in Mr William Cheng's or a related company names, the offending alleged is money laundering and/or tax offending—not methamphetamine offending. In relation to all

of the properties, the underlying offending alleged is money laundering and/or tax offending.

[16] The investigation into the involvement of Ms Nyioh and Mr William Cheng in money laundering and tax activities was triggered by Mr Thomas Cheng's arrest and by information gathered leading up to and at the time of his arrest.

### **The restraining orders**

#### *Order One*

[17] On 4 April 2016 Wylie J made Order One on a without notice basis. An on-notice application to maintain that order followed. Mr William Cheng and Ms Nyioh opposed that application as interested parties.

[18] On 28 September 2016 Simon France J upheld the application to maintain the restraining order following a hearing.<sup>8</sup> This decision dealt with an application to release restrained funds in Mr William Cheng's name of \$74,024.35.

[19] His Honour found, under s 24 of the Criminal Proceeds (Recovery) Act 2009 (the Act), there were reasonable grounds to believe the account had been tainted by Mr Thomas Cheng making deposits into it totalling \$46,925 which had come from the alleged drug activity. He concluded that the definitions in the Act meant the intermingling tainted the entire sum.<sup>9</sup> However, the Judge said that the rest of the money had been acquired from a legitimate source, and therefore the Commissioner's argument did not support the retention of funds beyond the tainted amount of \$46,925.

[20] The Judge also found reasonable grounds to believe that Mr William Cheng, in his own right, had unlawfully benefited from significant criminal activity, and therefore made a restraining order under s 25 of the Act. This activity was tax evasion involving both Mr William Cheng and the companies with which he was associated and controlled.

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<sup>8</sup> *Commissioner of Police v Cheng*, above n 3.

<sup>9</sup> At [12].

[21] Simon France J found that there were reasonable grounds to believe tax evasion had occurred. The lack of evidence of any proper tax treatment coupled with “the extremely complex ownership structures” led to the basis for the belief that there had been significant evasion of the company’s tax obligations in relation to the properties.<sup>10</sup> The Judge also found that Mr William Cheng had a controlling interest in the properties, was aware of the tax evasion and was implicated, at least as a party, to deliberate tax evasion. He noted that the lack of any tax returns filed for interest earned on Mr William Cheng’s own very large deposits suggested a pattern of tax offending.

[22] France J was also satisfied that, other than the sum deposited by Mr Thomas Cheng, the rest of the money was not the product of his serious criminal activity, but that it was appropriately restrained under s 25 of the Act. That section did not require the property to itself be linked to the alleged significant criminal activity, just that Mr William Cheng had unlawfully benefitted from the alleged significant criminal activity and that the money was his property.

#### *Order Two*

[23] The application for Order Two was made as a result of the investigations following Order One.

[24] This order was sought on the basis Mr Thomas Cheng had been implicated in significant criminal activity (the importation, sale and supply of methamphetamine). In addition, it was alleged that Mr Thomas Cheng, Mr William Cheng and Ms Nyioh had all benefited from tax evasion and money laundering, also significant criminal activities.

[25] At the time the restraining order was made the Commissioner indicated that he believed that Mr William Cheng had been involved in criminal offending that was yet to be identified and that he was concealing the proceeds of that offending in New Zealand. Subject to identifying the nature of the offending, he alleged that such behaviour would amount to money laundering in any event.

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<sup>10</sup> At [15].

[26] The Commissioner said that the restraint of the properties and funds was required to enable inquiries to be completed to establish the origin of the funds held or used to acquire New Zealand assets. In addition, the Commissioner needed to ascertain the extent of the taint to any of properties under restraint or sought to be restrained.

[27] The Commissioner indicated that an initial financial analysis had identified substantial income received into accounts held by Mr William Cheng, Mr Thomas Cheng and associated entities. He said that further inquiries would likely include formal requests for assistance from Singaporean law enforcement agencies including with the police, regulatory and revenue authorities. The Commissioner indicated these inquiries were likely to require requests using the Mutual Assistance in Criminal Matters Act framework to facilitate the provision of the information sought.

[28] The second restraining orders were made on 1 May 2017 in the absence of opposition.<sup>11</sup>

### **The issues**

[29] Mr Thomas Cheng Mr William Cheng and Ms Nyioh oppose the applications to extend the duration of the restraining orders. The opposition is based on:

- (a) The insufficiency of the evidence underpinning the restraining orders.
- (b) The length of time for which the restraining orders have been in place already.
- (c) The right to be free from unreasonable search and seizure which require a limit to the extent of the intrusion of a restraining order.<sup>12</sup>

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<sup>11</sup> *Commissioner of Police v Cheng*, above n 4.

<sup>12</sup> New Zealand Bill of Rights Act 1990, s 21.

## The legislation

[30] The purpose of the Act provides for the restraint and forfeiture of property derived from significant criminal activity without the need for a conviction.<sup>13</sup> A restraining order is effectively an interim order of limited duration to preserve property while Commissioner gathers evidence to support an application for forfeiture.<sup>14</sup> In order for a restraining order to be made, a Court must be satisfied it has reasonable grounds to believe the respondent has unlawfully benefited from significant criminal activity.<sup>15</sup> Alternatively, a Court must be satisfied it has reasonable grounds to believe a specific piece of property has been tainted by significant criminal activity.<sup>16</sup> The evidential threshold for the making of a restraining order has been described as a “relatively low” one.<sup>17</sup> Orders One and Two are both restraining orders of this nature.

[31] A restraining order expires one year after it was made if no forfeiture order is made before that date.<sup>18</sup> The Court is able, however, to extend the duration of a restraining order for a period of up to one year.<sup>19</sup> Repeat extensions are expressly permitted.<sup>20</sup>

[32] There is a wide discretion to extend restraining orders. However, that discretion must be exercised in a reasonable manner “having regard to the purpose of the Act and the nature and purpose of the restraining orders”.<sup>21</sup>

[33] The primary purpose of the regime is to ensure property that has been derived from significant criminal activity or that represents the value of unlawful income is forfeited.<sup>22</sup> It proposes to deter, eliminate and reduce the number of people that are able to engage in profit making from significant criminal activity.<sup>23</sup>

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<sup>13</sup> Criminal Proceeds (Recovery) Act, ss 4(1)(a) and 6

<sup>14</sup> *Vincent v Commissioner of Police* [2013] NZCA 412 at [45].

<sup>15</sup> Criminal Proceeds (Recovery) Act, s 25(1).

<sup>16</sup> Sections 24 and 5 definition of “tainted property”.

<sup>17</sup> *Commissioner of Police v Evans* [2014] NZHC 3109 at [9]; *Commissioner of Police v McKinley* [2014] NZHC 3131 at [14].

<sup>18</sup> Criminal Proceeds (Recovery) Act, s 37(1).

<sup>19</sup> Section 37(2)(d).

<sup>20</sup> Section 41(3).

<sup>21</sup> *Commissioner of Police v Reed* [2013] NZHC 802 at [34].

<sup>22</sup> Criminal Proceeds (Recovery) Act, s 3(1).

<sup>23</sup> Section 3(2).



[34] Nevertheless, it must be borne in mind that the orders are “interim orders of limited duration”.<sup>24</sup> A restraining order can be highly prejudicial to those affected by it which is the reason that an extension of such orders is subject to judicial oversight.<sup>25</sup> The risk is that the Commissioner will obtain a defacto forfeiture order without following the prescribed statutory process if the restraining order is extended repeatedly.<sup>26</sup> Against that, an application for civil forfeiture may be declined on the basis of insufficient evidence. This may be the result if the Commissioner has not had the opportunity to complete his investigation.

[35] The restraining orders may preserve the property while the Crown is gathering evidence to support an application for forfeiture, but this cannot go on forever.<sup>27</sup>

## **Analysis**

### *Sufficiency of the evidence*

[36] The Gisborne properties are restrained under the Order One on the basis of “profit forfeiture” rather than on a “tainted” property basis.<sup>28</sup> The properties restrained under Order Two are sought to be restrained on the basis of tainting.<sup>29</sup>

[37] The allegations of significant criminal in relation to all the real estate rest on money laundering and/or tax offending. Counsel for Mr Thomas Cheng indicated that it was not clear whether it was alleged that Mr Thomas Cheng had been involved in money laundering and/or tax offending as the initial allegations against him concerned the methamphetamine dealing. As will be apparent from my findings below, I am satisfied that there are reasonable grounds to believe that Mr Thomas Cheng has unlawfully benefited from money laundering.

[38] Order One was made following Simon France J’s conclusion that he was satisfied he had reasonable grounds to believe that there had been significant evasion

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<sup>24</sup> *Commissioner of Police v Burgess* [2015] NZHC 1008 at [34]

<sup>25</sup> At [36].

<sup>26</sup> At [37].

<sup>27</sup> At [39].

<sup>28</sup> Criminal Proceeds (Recovery) Act, s 25.

<sup>29</sup> Section 24.

of the company's tax obligations in relation to the commercial properties.<sup>30</sup> This was because of the lack of any evidence of proper tax treatment together with the complex ownership structures. The position remains that:

- (a) At the relevant times, Mr William Cheng had a tax number but had not filed anything with the IRD. He had several other bank accounts in New Zealand (apart from those restrained) with a total credit balance exceeding \$10,000,000. There had been no accounting to the IRD concerning interest earned on those accounts.<sup>31</sup>
- (b) Ms Nyioh and Mr Thomas Cheng did not have New Zealand IRD tax numbers.
- (c) None of the corporate owners and mortgagees of the properties had filed income tax or GST returns with the IRD.
- (d) Mr Thomas Cheng's girlfriend, Ms McKaye, was appointed a co-director of each of the company's named as the second, third, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth and seventeenth respondents. Mr Thomas Cheng said this was at the instigation of Ms Nyioh to meet obligations owed to the IRD in respect of those companies. Mr Thomas Cheng was of the view that Ms McKaye was filling in a "void" to help out for which a nominal fee was paid.
- (e) Mr Thomas Cheng said that Ms McKaye was his partner until last year. That relationship has now faltered. It appears that Ms McKaye has also fallen out with Mr William Cheng and Ms Nyioh over financial allegations by them against her.
- (f) Apart from the involvement of Ms McKaye, the directors, or persons in control of the companies are Mr William Cheng and Ms Nyioh.

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<sup>30</sup> *Commissioner of Police v Cheng*, above n 3.

<sup>31</sup> Recognising withholding tax will have been taken.

- (g) Ms McKaye apparently had no idea what activities the relevant companies undertook, nor did she have any knowledge about the assets, liabilities or income streams of the companies. She was also not aware of her obligations as a company director. It appears she has no business or governance experience.
- (h) Ms Nyioh and Mr Thomas Cheng are the donees of a power of attorney from Mr William Cheng.
- (i) The financial analysis indicates that deposits in the various bank accounts had closing balances totalling over \$10,000,000 as at 4 October 2016. An analysis of the deposits and withdrawals suggests half the deposits are interest income, rental and cash deposits and so taxable income which has not been declared. Deposits into the bank accounts made by the fourteenth respondent, (Unitech Investments) of over \$12,000,000 are yet to be analysed to determine the source of those funds and any resultant tax implications which might arise.

[39] That information outlined above was the basis of the belief by the Commissioner that Mr Thomas Cheng had beneficial ownership in and effective control of the property sought for restraint.

[40] In addition are the statements made by Mr Thomas Cheng to the undercover detective that he owned 27 properties in New Zealand. As to the power of attorney that Mr Thomas Cheng has over his father's affairs the Commissioner says affords Ms Nyioh and Mr Thomas Cheng with effective control over the assets restrained.<sup>32</sup>

[41] The Commissioner also believes that Mr William Cheng and Ms Nyioh have unlawfully benefited from significant activity, mainly tax evasion and money laundering, on the basis set out above. The Commissioner notes that no income has been paid in relation to rental from the properties, despite Ms Nyioh claiming that Mr William Cheng and the associated entities are meeting their tax obligations. Neither Ms Nyioh or Mr William Cheng reside in New Zealand. They provided false

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<sup>32</sup> Criminal Proceeds (Recovery) Act, s 58.

information to the Companies Office in an attempt to convince them that they were resident in New Zealand. The Commissioner also highlights their use of different derivatives of their names at different times in documents submitted in respect of the various companies with which they are associated, or properties owned by these entities.

[42] Mr William Cheng and Ms Nyioh also applied for New Zealand residency but were unable to satisfy Immigration New Zealand of the origin of the \$10,000,000 funds they claimed that were held in their accounts. Proof of origin was required for the application.

[43] In relation to the allegations of money laundering, the Commissioner referred to three globally accepted stages in the money laundering cycle. These are placement, layering and integration. Placement involves introducing the proceeds of crime into the financial system. This is often in the form of cash deposits at banks. Layering is where the proceeds of crime are put through a series of transactions to complicate or confuse the trail, making it more difficult for investigators to link the funds back to the original offending. The goal is to conceal the criminal origin of proceeds. Integration involves the co-mingling of funds and introduction into legitimate property. This might include the purchasing of real estate or other major assets. Other methodology includes the deliberate co-mingling of criminal proceeds with business earnings and presentation of the total amount as legitimate business income.

[44] The Commissioner points to an established pattern by Mr William Cheng and Ms Nyioh of purchasing or registering assets in the name of Singaporean or New Zealand companies with mortgages registered against the properties traceable through the control of the mortgagee back to entities controlled by William Cheng and Ms Nyioh. This gives an appearance that there are legitimate encumbrances in favour of arm's length third parties.

[45] In addition, to satisfy the requirement that a company must have a New Zealand resident Ms McKaye was appointed. The evidence and her lack of knowledge and experience points to the fact she is or was acting under the direction of Mr William Cheng and Ms Nyioh as well as her partner, Mr Thomas Cheng.

[46] The Commissioner also says Mr Thomas Cheng has been involved in money laundering activity and points to the fact that he said he owned 27 properties in New Zealand, he previously was a partner in Action Investment LLP (the fifth respondent) and is the current proprietor of one of the Order One properties. It is also Mr Thomas Cheng's partner who was introduced to take the directorship of several of the companies. Mr Thomas Cheng initially indicated that he had asked her to be a director but later denied that and said he might have been part of the conversation before or after she was appointed.

[47] Mr Thomas Cheng in his evidence said he did not have any knowledge of his father or his step-mother's affairs, did not own or control the properties, did not manage his father's affairs through the power of attorney nor did he receive any income by way of rental. He said he had been just managing some of the properties, and collecting rent but had no responsibility for the tax. He is now a serving prisoner.

[48] Mr Thomas Cheng also gave evidence concerning money and bank accounts which are not the subject of these proceedings. These are not relevant to the issues before me today so I put those comments to one side.

[49] Ms Nyioh did not give evidence. She had given evidence at the hearing before Justice Simon France in September 2016. Her explanations at that time for the business arrangements were not accepted by the Judge. He said he did not find her evidence satisfactory and that he did not accept it as providing a legitimate explanation for the arrangements.<sup>33</sup>

[50] In the circumstances I am satisfied Orders One and Two were properly made and that there is no evidence before me in this application that would have altered the conclusions made at the time the restraining orders were originally made and subsequently extended. In particular I note I reach this conclusion on the basis of all of the factual information above. I am satisfied there are reasonable grounds to believe that Mr William Cheng, Mr Thomas Cheng and Ms Nyioh have unlawfully benefitted

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<sup>33</sup> *Commissioner of Police v Cheng*, above n 3, at [10].

from significant criminal activities and a restraining order should be made in relation to all of the properties specified in Order One and Order Two.<sup>34</sup>

[51] I note a further submission was made that an effective control order should have been sought as Mr Thomas Cheng did not apparently own or have an interest in the properties. However, at this stage given that Mr Thomas Cheng holds his father's power of attorney and is connected with the properties as outlined above, I am of the view there is sufficient evidence to support my finding that Mr Thomas Cheng has an interest in or a right power or privilege in connection with the property.<sup>35</sup>

*Delay and interests of justice*

[52] The respondents say that the substantial delay in bringing the forfeiture applications is such that the restraining orders should not be extended. They say the delay is prejudicial per se in that they cannot deal with their own property. In addition, they point to the fact that the restraining orders have unsettled the tenants. Restraining orders, of course, also mean that the properties cannot be dealt with in any way without the consent of the Commissioner. The respondents point to the substantial length of time that has gone by since the restraining orders were first obtained.

[53] Ms Cleary for the Commissioner says that if the respondent sought to deal with the properties, by selling or mortgaging one of them, the usual practice was that the Commissioner would be approached for consent and an arrangement would be reached usually along the lines that the property could be sold but the proceeds of sale would be subject to restraint.

[54] The tenants have remained in the properties since the orders were made. The properties are being administered by Mr Franklin, a New Zealand accountant appointed by the respondents. The restraining order has apparently caused no problems in the operating of the rental properties, their management or gathering the returns from the properties. Only the balance of the funds existing in the bank

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<sup>34</sup> Criminal Proceeds (Recovery) Act, s 25.

<sup>35</sup> Section 5 definition of "interest".

accounts at the time the restraining orders were obtained are the subject of restraint. Money paid in and out of the account since then is not the subject of restraint.

[55] Counsel for the respondents submitted that the restraint was tantamount to seizure or deprivation of interest in a property and therefore the continued extension of the restraining orders was unreasonable in the circumstances. In that regard counsel pointed to s 21 of the New Zealand Bill of Rights Act that provides everyone has a right to be secure against unreasonable search and seizure of property.

[56] In this case it was submitted that the continuation of the restraining order was unreasonable because of:

- (a) The length of time since the restraining orders were first obtained (April 2016 and December 2016 respectively).
- (b) The major cause of the delay is because the Commissioner has not been more efficient in his pursuit of the information required to make his application for forfeiture. The delays have not been caused or contributed to by the respondents.

[57] Counsel referred me to *Commissioner of Police v Malcolm* in which considered the restraining orders which had been in place for over two and a half years. Ronald Young J declined to grant the extension sought, instead granting a shorter extension to enable the forfeiture application to be filed.<sup>36</sup> The Judge there stressed that it was the final extension that would be granted. In *Burgess* the delay and length of time between the making of some of the restraining orders and the application for forfeiture was five years.<sup>37</sup> The delay occurred because Mr and Mrs Burgess could not be examined until the criminal processes had been completed. In that case the Judge accepted that significant delay might justify the refusal of extension or discharging of an order but dismissed the objections to delay and made the orders in that case.

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<sup>36</sup> *Commissioner of Police v Malcolm* [2013] NZHC 132.

<sup>37</sup> *Commissioner of Police v Burgess*, above n 24.

[58] Counsel for the respondents submit that the distinction between *Burgess* and the facts of this case are that in *Burgess* the reasons for the delay were adequately explained by delays in the criminal process. In this case there is no criminal process underway. The main reason put forward justifying the delays here are the need to complete criminal investigations and gather evidence sufficient to support an application for a forfeiture order. This includes the time required to gather information from the Singapore and Hong Kong authorities.

[59] The Commissioner points out that a number of overseas mutual assistance requests have already been made. Information has been sought from Hong Kong and Singapore. The first application for a mutual assistance request to Singapore was made in December 2017 and to Hong Kong in January 2018. Mr Thomas Cheng was examined on 27 February 2018, following his conviction and sentencing on the methamphetamine dealing charges. Various production orders were also executed from May 2017. Most recently, production orders were executed in the period May to June 2019. These include production orders to telecommunication providers, banks and law firms. Examinations of Ms McKaye and others were carried out in July 2019.

[60] Disclosure was received from Hong Kong authorities pursuant to a mutual assistance request in September 2019. However, Commissioner says that disclosure has not been completed in response to the request made to Singapore. Information is being sought concerning the tax treatment of the relevant income by the Singapore tax authorities. This is to deal with the need to recognise tax paid in another jurisdiction in which has an arrangement with New Zealand.

[61] The Commissioner says that Mr William Cheng and Ms Nyioh have been uncooperative which means he must wait for the information through the mutual assistance request process. It could have been supplied by them. Counsel points out any assistance by Mr William Cheng and Ms Nyioh must be voluntary. The Commissioner cannot enforce production or obtain the information through legal processes against them outside New Zealand. While there has been some informal data production by authorities from outside the jurisdiction the only option open to the Commissioner, he says, is to use the formal process which is slow and cumbersome.



[62] In my view the Commissioner's explanation for the delays in the circumstances is reasonable. Money laundering is usually complex, particularly where it involves multiple foreign entities and is difficult to detect and to investigate. The explanation for the investigation of the tax position in Singapore is reasonable. Tax evasion carried out over multiple jurisdictions using third party owners is complex and often takes time to unravel. Reliance on the mutual assistance request process slows things down. There is a need to use this process, however, in the absence of real assistance by Mr William Cheng and Ms Nyioh. Of course, they do not need to cooperate.

[63] While Mr William Cheng and Ms Nyioh are not obliged to provide the evidence while they are out of the jurisdiction, they could speed up the process by supplying the information. That is not irrelevant in the context of a claim about the unfairness of how long an investigation is taking.

[64] The rights of persons not to be deprived of their property without proper process is an important factor and must be put in the balance. In this case the involvement of foreign jurisdictions has necessarily introduced delays which otherwise might not be acceptable.

[65] Nevertheless, it is three and a half years since Order One was made and two years and nine months since Order Two was made. In that time Mr Thomas Cheng's methamphetamine dealing which triggered the investigations leading to the current restraining orders has become largely irrelevant, he was sentenced on 22 February 2018, almost a year and a half ago.

[66] Nevertheless, I am of the view that considering the complex structures involved, offshore involvement and consequent difficulties of investigating the alleged offending, an extension of the orders is justified.

[67] Against that, the Commissioner should bring the application for forfeiture as soon as possible. I had considered making an extension for a shorter time than the 12 months sought. However, given the nature of the investigations in my view it is appropriate to make the order for 12 months to enable the investigations to be progressed properly.

## **Conclusion**

[68] I am satisfied that the restraining orders were properly obtained. The circumstances have not changed such as to require reconsideration of the basis for the restraining orders. Further information received in the investigations reinforce the basis for the restraining orders.

[69] I conclude that in the circumstances the delays in applying for forfeiture orders are reasonable and an extension of 12 months is granted.

[70] In the usual course the Commissioner would be entitled to costs. It appears the appropriate scale would be 2B together with reasonable disbursements. If counsel are unable to agree on costs memoranda should be filed by the applicant on or before seven days from the date of delivery of judgment; any responses to be filed within a further seven days and the applicant to file any reply within a further three days.

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Grice J